In The

Supreme Court of the United States

October Term, 1977

No. 77-357

LARRY DALE PATTY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Virginia can be found in 218 Va. 150, S.E.2d (1977), and is set forth in the Appendix to the Petition.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

During the early morning hours of February 11, 1975, Harold Green, the operator of the Greenville Mobil Service Center, found a yellow Pontiac bearing Texas license plates broken down and unattended on his lot (T. 7, 8).* At a little after 7:00 a.m. that morning Mr. Green received a telephone call from a man asking that the car be fixed (T. 8, 9). The repairs on the car were concluded a little before 2:00 p.m., and as the rear of the car was being lowered, the trunk lid flew up (T. 12, 13).

Several people who were at the service station lot saw the contents of the trunk and called the police. Officer Fisher arrived at the service station just before 3:00 p.m. (M.T. 18). Upon arrival he spoke with Mr. Green's son who described what he had seen in the trunk, and told the officer that he recognized the contents as marijuana based upon a high school lecture (M.T. 13, 16). Officer Fisher then spoke with Mr. Hecht and Mr. Noble, both of whom described the contents as green plant material packaged in a combination of brown wrapping paper and plastic wrappers (M.T. 14). Mr. Hecht drew a picture of what the seeds looked like (M.T. 15). Mr. Hecht had seen marijuana before at his home (T. 26), and described the taste and odor of the material (T. 30). The material in the trunk had the same smell as the marijuana Mr. Hecht had observed in his house (T. 37).

Officer Fisher was advised that the suspect's car was to be picked up between 4:00 and 5:00 p.m. Officer Fisher then relayed all of this information to Sergeant Russell at approximately 3:30 p.m., and it was decided not to approach the subject Pontiac for fear that it might be under surveillance (M.T. 21, 22, 27, 37). Sergeant Russell requested back-up support and got additional men in place around 5:00 p.m. (M.T. 33). Sergeant Russell determined it was not feasible to obtain a search warrant since they were dealing with unknown persons, and did not know exactly when they were coming (M.T. 27, 32, 33, 34). The suspects were expected any minute (M.T. 33). Officer Fisher was in the service station, and Sergeant Russell concluded it would not be proper to pull him out to seek a search warrant (M.T. 34). The evidence showed that the nearest magistrate was 15 minutes away, and it took anywhere from one hour to eight hours to obtain a search warrant (M.T. 22, 24, 32).

* References are to the Trial Transcript (T.) and the Transcript of the motion to Suppress (M.T.).

The Pontiac had been disabled by Mr. Green's son at approximately 3:30 p.m. (T. 19). This information was known to the police, but it is unclear when it was learned (T. 48).

At approximately 8:10 p.m., an automobile containing four adults drove into the service station. The petitioner and another male went to the Pontiac, and the petitioner got under the steering wheel (M.T. 18, 35). The petitioner and his companions were arrested, and the keys to the Pontiac were in petitioner's possession (M.T. 35). The trunk of the Pontiac was then broken into, and the police recovered over 400 pounds of marijuana (T. 45).

ARGUMENT AGAINST GRANTING CERTIORARI

The Search Of The Vehicle Was Constitutional.

A. Forfeiture

Section 18.2-249 of the Code of Virginia (1950), as amended, provides in pertinent part:

> "All money, medical equipment, office equipment, laboratory equipment, motor vehicle or other conveyance, and all other personal property of any kind or character, used in connection with the illegal manufacture, sale or distribution of controlled substances in violation of § 18.2-248(a), shall be forfeited to the Commonwealth and may be seized by an officer to be disposed of in the same manner as provided for the disposition of motor vehicles confiscated for illegally transporting alcoholic beverages and all of the provisions specified in § 4-56 of the Code shall apply mutatis mutandis."

At the time of the search the vehicle in question had been seized by the officers for forfeiture pursuant to § 18.2-249, and no warrant was required.

The present case is controlled by *Cooper* v. *California,* 386 U.S. 58 (1967). In *Cooper* the defendant was convicted of selling heroin to a police informer. The conviction rested in part on the introduction in evidence of a small piece of a brown paper sack seized by police without a warrant from the glove compartment of an automobile which police, upon petitioner's arrest, had impounded and were holding in a garage. The search occurred a week after the arrest of defendant. In finding that the warrantless search did not violate the Fourth Amendment, this Court held that the state statute authorized the seizure of a car used to transport narcotics and that the officers seized the car because of the crime for which they arrested the defendant.

As recognized by Mr. Justice Brennan in his dissent in *Cady* v. *Dombrowski,* 413 U.S. 433, 453 (1973), an exception to the warrant requirement is that which sustains a search in connection with the seizure of an automobile for purposes of forfeiture proceedings. In discussing this exception, Justice Brennan reviewed the decision in *Cooper* v. *California* and said:

> "[T]he Court upheld the warrantless search of an automobile after it had been lawfully impounded pursuant to a California statute mandating the seizure and forfeiture of any vehicle used to facilitate the possession or transportation of narcotics. There, however, the police were authorized to treat the car in their custody as if it were their own, and the search was sustainable as an integral part of their right of retention."

The Second Circuit Court of Appeals has recently had the opportunity to review a similar situation in *United States* v. *Zaicek,* 519 F.2d 412 (1975). There the defendant and a companion were arrested for possessing a stolen car. The car was seized and removed to the police station where it was locked. The police later searched the car without a warrant and seized incriminating evidence. In reversing the district court, the Court of Appeals held that once property is seized by police pursuant to statute, such stolen or forfeitable property can be searched by them without a warrant. The Court reasoned that where the car is properly seized by the police pursuant to a forfeiture statute, they have a greater possessory interest in the car than the owner.

Likewise, in *Brune* v. *State,* 342 N.E.2d 637 (Ind. App. 1976), the Court, citing *Cooper* v. *California,* upheld the warrantless search of a car and trailer upon the forfeiture provisions of the state statute. *See also Chevrolet Truck* v. *Commonwealth,* 208 Va. 506, 158 S.E.2d 755 (1968).

B. Automobile Exception.

The law of search and seizure as it pertains to vehicles has been evolving over the years. In *Carroll* v. *United States,*

267 U.S. 132 (1925), this Court recognized a distinction between the warrantless search and seizure of automobiles or moveable vehicles, on the one hand, and the search of a house or office on the other. In *Chambers* v. *Maroney*, 399 U.S. 42 (1970), this Court outlined the development of automobile searches. The original theory for treating automobiles differently from houses was the factor of mobility. This factor has apparently been eroded over the years, at least as far as searches conducted by state officers. Warrantless searches of vehicles by state officers have been sustained by this Court in cases in which the possibilities of the vehicle being removed or evidence in it destroyed were remote, if not nonexistent. *Cf. Harris* v. *United States*, 390 U.S. 234 (1968); *Cooper* v. *California, supra; Cady* v. *Dombrowski, supra; Cardwell* v. *Lewis*, 417 U.S. 583 (1974). Part of the reason for this relaxation in the mobility theory has been the fact that a search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or a house. *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (Powell, J., concurring). Additionally, because of the very nature of automobiles, police are often brought into noncriminal contact with automobiles. *Cady* v. *Dombrowski, supra.*

With this background in mind, we now must examine the case at hand. In *United States* v. *Mitchell*, 538 F.2d 1230 (5th Cir. 1976), the sole question before the Fifth Circuit was the constitutional validity of a warrantless search of an automobile in which the defendant was apprehended and in which contraband was discovered. Federal drug officials had been contacted by a citizen who advised that he had been hired under suspicious circumstances to drive a truck from Mexico to the United States, and had received a cash bonus of $5,000. Investigation indicated that these arrangements were likely a cover for some sort of a contraband-smuggling scheme. The same citizen again advised the federal authorities that he was to pick up a truck (which he accurately described in great detail, including its Vermont license plate) in Mexico on a certain date, cross the border at a given time, and leave the truck on the parking lot of a specified motel in San Antonio, Texas. The citizen did all of these things and, as instructed by his employer, locked the vehicle, disposed of the keys, and departed the scene.

> "Shortly thereafter at about dusk, appellant Mitchell, who had been observed following Mancuso discretely all the way from Mexico, drove his rented automobile into the parking lot. The several agents who were lying in wait there saw him circle the parked truck, return to the public street and park. About ten minutes later, accompanied by his dog, he re-entered the lot and parked alongside the truck. Producing a key, Mitchell then unlocked the rear door of the truck's camper body, as well as the truck's cab. He then locked the dog in the cab and transferred the contents of his automobile to the truck's camper enclosure. Among these were several angle-irons and two hydraulic jacks, suitable for elevating the camper shell from the truck bed. These maneuvers were video-taped by the agents, in part by the use of special 'starlight' lens equipment provided by them in anticipation of night work. His transfers completed, Mitchell locked the truck throughout and drove off in his automobile. At this time, about an hour had elapsed from his first appearance at the parking lot that Sunday evening.
>
> "About half an hour later, having turned in his rented car as was later ascertained, he returned in a taxi. When he re-entered the truck cab, seated himself, and 'it appeared imminent that he was going to drive

the truck away,' agents converged on the truck and arrested him. About a forty-five minute wait then ensued while Customs' dogs trained to sense controlled substances were summoned. When their actions indicated the presence of such controlled substances in or about the camper, the agents attempted to gain access to the area between the camper floor and truck bed. After about a half-hour's effort and the removal of a hold-down bolt, they were able to pry up the camper and obtain a small sample of vegetable material which they recognized as marijuana. The camper shell was later removed by means of the jacks, and quantity of over 400 pounds of the substance was found hidden in the space between the camper floor and the truck bed. The agents neither had nor ever attempted to get a warrant authorizing any of these actions." 538 F.2d at 1231, 1232.

In *Mitchell,* the Fifth Circuit found probable cause for the search, and the Commonwealth submits that, in light of the facts previously mentioned, probable cause clearly existed in the case at bar. The defendant in *Mitchell,* like the petitioner in the present case, argued that for two reasons there were no exigent circumstances justifying the failure to obtain a search warrant.

First, the defendant argued that by the time of the search the truck had been immobilized, exigence had passed, and a warrant could have been obtained. The Fifth Circuit held this argument foreclosed by *Chambers* v. *Maroney* and *Cardwell* v. *Lewis.* "Both of these authorities recognized that exigence is to be determined as of the time of seizure of an automobile, not as of the time of its search; the fact that in these cases sufficient time to obtain a warrant had passed between each seizure and the corresponding search did not invalidate either." 538 F.2d at 1232. As noted by the Fifth

Circuit, at the time of the seizure, Mitchell had completed loading the truck, disposed of his other vehicle, and assumed the driver's seat, ignition key in hand. The Commonwealth submits that virtually the same facts exist in the present case. The petitioner here came to the service station, got into the Pontiac under the steering wheel with ignition key in hand. While it is true that the Pontiac had been disabled in the present case, this should not alter the result. Once the petitioner had paid for the repairs, the service station operator would have been required to replace the distributor cap and the petitioner could have driven away. If the service station operator had refused to replace the distributor cap, the petitioner would then have been alerted and could either have escaped or made other arrangements to move the car.

The Fifth Circuit also disposed of the defendant's argument that exigent circumstances did not exist because of the presence around the parking lot of ten or more surveilling agents rather than one or two by stating:

> "We have never before tested mobility of automobiles or exigence of circumstances by evaluating police capability to respond on the balance of forces deployed. Once commenced, the end of such a calculus would be evaluation of the opposing armaments and of the relative top speeds of the vehicles. We decline to embark on it." 538 F.2d at 1233.

Second, the defendant argued that exigence did not exist since the search was deliberately planned as a warrantless one. The Fifth Circuit took this to mean either that there was ample time after probable cause had arisen for obtaining a warrant but none was sought or that the agents, confident that they would be dealing with an automobile,

deliberately chose to take advantage of the so-called "automobile exception" to the warrant requirement. The Fifth Circuit recognized that the more prudent course would have been for the officers to have sought a warrant, but the fact that they failed to do so did not invalidate the search. The Court observed that the agents took a gamble that factors of exigence excusing the trip would arise, and since they did, it did not matter when they arose. Quoting from *Cardwell* v. *Lewis,* the Court said:

> "Respondent contends that here, unlike Chambers, probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practical moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of the arrest. (Citation omitted). The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action." 417 U.S. at 595-96; 538 F.2d at 1233.

The Commonwealth submits that the officers in the present case never had the opportunity to secure a search warrant that existed in *Mitchell.* When Sergeant Russell got his men into position, they were expecting the people who were coming for the Pontiac to arrive at any minute. The officers did not know who they were dealing with or how many. As it ended up, there were as many defendants

as police. Unlike the agents in *Mitchell,* Sergeant Russell was faced with an uncertain situation and determined it was not feasible to send one of the officers for a warrant.

The Fifth Circuit concluded its opinion in *Mitchell* with some thoughts which appropriately should receive universal acceptance:

> "We deal here with a crime and a criminal, not a sporting event. True, the constable put himself in the way to blunder, though he did not. Appellant would nevertheless have us disqualify him from the game because he chose a course less than the best, or perhaps because his heart was not entirely pure. But it is not a game, and we decline to do so." 538 F.2d at 1233-34.

Petitioner's reliance upon *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971), is misplaced. In *Cardwell* v. *Lewis, supra,* this Court, in a plurality opinion, distinguished *Coolidge* on the ground that there the police had entered on the defendant's private property and seized the car which was parked in his driveway. 417 U.S. at 593. *See also Cady* v. *Dombrowski, supra; Haefeli* v. *Chernoff,* 526 F.2d 1314 (1st Cir. 1975). *Coolidge* has also been distinguished when the subject of the search is contraband. *United States* v. *Mitchell,* 538 F.2d 1230, 1233 n.3.

It is also of no moment that petitioner's car was seized at the service station rather than on open highway. In addressing this question, this Court in *Cardwell* v. *Lewis, supra,* stated:

> "The fact that the car in Chambers was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot has little, if any, legal significance. The same arguments and considerations of exigency, immobilization on the spot, and posting a guard obtain." 417 U.S. at 594.

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia submits that the search of the vehicle in question was proper and constitutional and in keeping with prior decisions of this Court. This case does not present to the Court any issue which is novel or would have national significance. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, James E. Kulp, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and I have mailed three copies of this Brief in Opposition to P. H. Harrington, Jr., Esquire, 10560 Main Street, Suite 211, Fairfax, Virginia 22030, counsel for petitioner, on November 25, 1977.

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